

1
2
3
4
5
6
7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF OREGON
9

10 ARCH CHEMICALS, INC.,
11 a Virginia corporation, and
LEXINGTON INSURANCE COMPANY,

No. 07-1339-HU

12 Plaintiff,

13 v.

OPINION AND ORDER

14 RADIATOR SPECIALTY COMPANY,
15 a North Carolina corporation,

16 Defendant.
17

18 HUBEL, Magistrate Judge:

19 Before the court is the motion of Arch Chemicals, Inc. (Arch)
20 to exclude evidence of the absence of prior incidents (#338). Arch
21 anticipates that at trial RSC will argue that never before has
22 anyone claimed that RSC's product, Gunk Engine Brite, (1) is
23 packaged such that it could leak out, as Arch theorizes it did in
24 this case, or (2) was ignited by a static spark or had an
25 exothermic reaction to cause a fire. According to Arch, RSC cannot
26 lay the proper foundation to introduce evidence of the absence of
27

28 OPINION AND ORDER Page 1

1 prior incidents.

2 The parties agree the absence of prior claims can be relevant
3 if based upon substantially similar circumstances. The party
4 offering evidence of a prior claim, fire or inadvertent discharge
5 of EB-1, or the absence of such events in this case, bears the
6 burden of establishing the substantial similarity of the event, or
7 the potential for the event that did not occur, and the
8 reasonableness that the defendant would have gotten notice of the
9 event in the case of the evidence RSC wants to offer.

10 It appears the evidence will be offered by RSC on a variety of
11 issues, for instance lack of knowledge of the alleged product
12 defects, and direct evidence of the lack of such defects from the
13 lack of incidents. To show RSC's knowledge, or lack thereof, of a
14 problem with the packaging of EB-1 as it relates to the theory of
15 inadvertent release or leakage from spray cans of EB-1, the sales
16 reported must be of packaging substantially similar to the cans in
17 the Davidson vehicle at the time of the fire, and there must be
18 evidence of some reason to think the "claims" or "incidents" would
19 come to the attention of RSC.

20 Likewise, to show knowledge or the lack thereof of fires from
21 discharges from the EB-1 cans will require a foundation showing
22 that the units sold which had no reported fires contained a product
23 with formula with a substantial similarity to the formula of EB-1
24 in Davidson vehicle with respect to ignitability and/or the
25 substantially similar propensity for an exothermic reaction leading
26 to a fire if it is commingled with another product. Further, there
27

1 must be evidence of some reason to think the "claims" or
2 "incidents" would come to the attention of RSC.

3 The same sort of foundation is needed to make this type of
4 evidence admissible for direct evidence of the lack of a product
5 defect. To prove or suggest a lack of credibility of plaintiff's
6 expert's theories from lack of prior fires again requires the same
7 sort of foundation to be established.

8 While I am denying this motion on this record, if this lack of
9 prior claims/incidents evidence is to be offered at trial by
10 defendant, it needs to be identified in defendant's pretrial
11 conference filings and the foundation planned needs to be described
12 with good particularity so objections can be properly made in the
13 plaintiffs' filings. While it is hoped the court will be able to
14 rule on such objections at the pretrial conference, it may be that
15 I have to see the evidence at trial before I can properly evaluate
16 the foundation, relevance, and 403 prejudice arguments and make a
17 final ruling on this lack of prior claims/incidents testimony from
18 RSC.

19 IT IS SO ORDERED.

20
21 DATED this 10th day of December, 2010.

22 /s/ Dennis J. Hubel

23 _____
24 Dennis James Hubel
25 United States Magistrate Judge
26
27